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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 MOSHELL,

4 Plaintiff,

5 v.

20CV1008(JPC)
Telephone Conference

6 SASOL LIMITED, et al.,

7 Defendants.

8 -----x

New York, N.Y.
November 10, 2020
4:02 p.m.

9
10 Before:

11 HON. JOHN P. CRONAN,

12 District Judge

13 APPEARANCES

14 HAGENS BERMAN SOBOL SHAPIRO LLP

15 Attorneys for Plaintiff

16 BY: LUCAS E. GILMORE

17 WEIL GOTSHAL & MANGES LLP

Attorneys for Defendants

18 BY: JONATHAN D. POLKES

19 HACH ROSE SCHIRRIPA & CHEVERIE LLP

Attorneys for Movant

20 BY: FRANK R. SCHIRRIPA

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1 (The Court and all parties appearing telephonically)

2 (Case Called)

3 MR. BERMAN: Good afternoon, your Honor. This is
4 Steve Berman for the plaintiffs. With me is Lucas Gilmore from
5 my firm.

6 THE COURT: This is Judge Cronan.

7 Who do we have for the defendants?

8 MR. POLKES: Your Honor, this is Jonathan Polkes from
9 Weil Gotshal for all of the defendants. I'm with my partner,
10 Caroline Zalka.

11 THE COURT: Good afternoon, Mr. Polkes and Ms. Zalka.

12 Let me start with Mr. Berman or Mr. Gilmore.

13 As the parties know, this case was reassigned to me
14 from Judge Rakoff, probably about a month and a half ago or so.
15 I've reviewed the materials, including the most recent
16 submissions from the defendants pertaining to the motion for
17 reconsideration, sanctions, and the confidential witnesses.

18 Mr. Berman or Mr. Gilmore, I want to give you the
19 chance to respond to the issue with respect to the three
20 confidential witnesses who have submitted declarations. Those
21 declarations are rather troubling, given what the allegations
22 were in the complaint.

23 Do you still stand by the allegations in the
24 complaint?

25 MR. GILMORE: Your Honor, this is Lucas Gilmore.

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1 The answer is, absolutely. We intend to file an
2 opposition on Friday, and we want to be heard and briefed.

3 I want to highlight the three major points and preview
4 for the Court that we're going to make.

5 The first is that this motion, including the new
6 affidavits, has absolutely no merit. The complaint accurately
7 alleges these three CWs' accounts, and all of the CW accounts.
8 There have been no fabrications, no exaggerations, period, and
9 we'll submit evidence to the Court proving this.

10 We have a trail of communications that our
11 investigator, a seasoned professional, had with each of these
12 confidential witnesses, that are going to show that the
13 confidential witnesses were cooperating.

14 The three recanting CWs' affidavits, which were
15 carefully crafted by defense counsel, are verifiably wrong.
16 They testify in their affidavits that they only spoke once to
17 our investigator for approximately 20 minutes. We're going to
18 produce the phone records showing that that's verifiably false.
19 They spoke multiple times, on some occasions for hours on end,
20 and they weren't talking about the weather. They were talking
21 about Sasol's fraud, which was corroborated through a variety
22 of other sources that the investigator documented every
23 conversation with contemporary notes and memos that our firm
24 was actively involved in directing the investigation.

25 However, each of the three confidential witnesses, now

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1 represented by defense counsel, had expressed concerns about
2 their identity being learned by their former employer, Sasol,
3 and learning of their cooperation, but we told them that we
4 could not guarantee their confidentiality based off the state
5 of the law.

6 Two of the witnesses then asked to be compensated in
7 exchange for essentially blowing the whistle on their former
8 employer. When we told those two witnesses that we could not
9 do that, the witnesses realized that there was no financial
10 upside for them and stopped cooperating.

11 The third witness, one of our attorneys expressly
12 spoke to that witness, confirmed that the witness had spoken
13 with our investigator, but when the witness asked again about
14 whether his or her identity would be learned, and whether we
15 could prevent him from being subpoenaed in the case, we told
16 him we could not, then his cooperation was lost.

17 So, we're also going to show -- we're going to have
18 text messages that are going to be presented in which one of
19 the witnesses actually refers to himself as a whistleblower.

20 So, I think, with this powerful evidence that's going
21 to be before the Court, the Court is going to come to the
22 conclusion that there was no attorney inaccuracy, fabrication,
23 or exaggeration, but rather that the witnesses' recent change
24 of heart has to do with pressure and coercion exerted by their
25 former employer, Sasol.

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1 But, I do want to highlight a couple of other points.

2 The first is, both motions are procedurally defective
3 and brought for an improper purpose. The defendants have
4 brought this motion under Rule 11. It's very clear, under Rule
5 11(c), there is a notice period, it's called the safe harbor,
6 they didn't follow that, they didn't provide us notice of their
7 motion, they immediately filed it; they violated Rule 11.

8 They also violated Rule 12. They have submitted
9 additional extrinsic evidence on a purported pleading motion
10 converting this into a summary judgment motion.

11 Moreover, they violated local Rule 6.3, which deals
12 with reconsiderations and says that you cannot submit
13 affidavits without Court approval.

14 They did all of this because it's part of a common
15 litigation strategy that the defendants have employed from the
16 outset. They want to isolate and adjudicate the credibility of
17 the confidential witnesses' accounts. The problem with that,
18 as Judge Rakoff made very clear in denying that multiple times
19 is, you cannot isolate the CW accounts from the additional
20 evidence, very strong evidence, what Judge Rakoff said, of
21 their fraud. You have to look at it holistically.

22 So, we're not going to phase discovery or adjudicate a
23 single issue, but rather, we need to put a complete record
24 before the Court.

25 And then, lastly, Mr. Schirripa is here. He

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1 represents the remaining CWs. They're going to submit
2 affidavits showing that our accounts were -- each and every one
3 of their allegations are entirely accurate. It will also point
4 out, in our opposition, that in the affidavits from these
5 witnesses, even still, they're not denying key, core
6 allegations that we attribute to them that they said, including
7 cost overruns, Sarbanes-Oxley violations, at the direction of
8 Sasol managers.

9 So, even if the Court were to consider this, quote,
10 new evidence, which is improper, the Court would still come to
11 the same conclusion, that the motion to dismiss should be
12 denied and that we should proceed for trial.

13 THE COURT: This is Judge Cronan.

14 Mr. Gilmore, will you also be addressing the issue of
15 the change order and, essentially, the declaration from, I
16 believe, McNulty, and I believe the other witness, as well,
17 whose name is escaping me, that the change order could not have
18 existed in the way that it is presented in the complaint?

19 MR. GILMORE: Well, your Honor, we'll address that
20 through submitting a declaration by CW1, who says that -- who
21 confirms the existence of that change order, and then we're
22 going to -- we take major issue with these affidavits. Again,
23 they're offered on a purported pleading motion, which is
24 extrinsic evidence outside of the complaint, so it's converted
25 to a summary judgment motion.

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1 You have one individual, a Sasol representative who is
2 testifying as to the existence of a contract, making legal
3 conclusions of how it should be interpreted, but they haven't
4 even produced that contract to us or any of the contractual
5 communications.

6 You also have the Sasol-representative claim that
7 there is a lack of existence of this floor order based on his
8 review of records pertaining to the LCCP, but they admittedly
9 haven't produced the records that he is reviewing.

10 Lastly, the Sasol representative who offered the
11 declaration was not even identified on defendant's Rule 26
12 disclosures as having relevant information, and he was not
13 identified as the person from the CW who would have received
14 the floor change order.

15 So, one, it's completely improper on a pleading motion
16 to submit this extrinsic evidence. Two, this is converted into
17 a summary judgment motion under the existing case management
18 plan. That summary judgment motion is supposed to be
19 adjudicated after full discovery. We're confident, after we
20 get that full discovery, that we will submit evidence
21 supporting defendant's knowledge that the costs were far
22 greater than what was represented to investors.

23 THE COURT: This is Judge Cronan.

24 Thank you, Mr. Gilmore.

25 I apologize, I just briefly dropped off, but it was

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1 not before I think you finished speaking, so I captured
2 everything that you said.

3 Mr. Polkes, can I ask you why a motion for
4 reconsideration is the proper posture here for some of the
5 reasons that Mr. Gilmore mentioned? Wouldn't this be more of a
6 motion for summary judgment, given the nature of the
7 allegations you're making here?

8 MR. POLKES: The answer to that is no, your Honor.
9 And thank you for giving me this opportunity. And I would like
10 to respond to what you just heard, which was completely outside
11 the law with regard to this area.

12 Your Honor, one thing you didn't hear just now is a
13 reputation of the critical issue here, which is, did
14 plaintiff's counsel or didn't they advise these confidential
15 witnesses that their statements would be used in connection
16 with litigation? Did they get their consent to it? And did
17 they, the plaintiff's lawyers themselves, show a draft of the
18 attributions that were to be made to them in the complaint to
19 the witnesses in advance?

20 Our witnesses say, the three whose declarations you
21 saw, that the answer to every one of those questions is no.
22 And very, very conspicuously, I was listening for it, you did
23 not hear a denial of that once in that flurry of words that you
24 just heard from plaintiff's counsel. If plaintiff's counsel
25 had shown a draft of the statements, a draft of the complaint

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1 to the witnesses, we would not be here right now.

2 I want to direct your Honor to two cases. One is
3 Millennial Media, which was written by Judge Engelmayer, and
4 the other is the Boeing case, which comes from the Seventh
5 Circuit; both were in our brief. Your Honor should, you know,
6 we can send them, but obviously, your Honor's clerk can find
7 them.

8 THE COURT: Sure.

9 MR. POLKES: They both made a critical point, which I
10 want to make now. The critical point is this, that it is
11 unseemly and inappropriate and outside the law to do exactly
12 what plaintiff's counsel are doing now, which is to get into a
13 fight as to where the CW is telling the truth before to our
14 investigator, or after, in other words, is what they're saying
15 now -- in their declarations, in their post-motion-to-dismiss
16 declarations -- true or false and put them on trial. That is
17 exactly what you are not allowed to do and not supposed to do.

18 Both cases emphasize -- and Judge Engelmayer called it
19 a matter of basic human decency -- did plaintiff's counsel show
20 a draft of what the statements were to the CWs in advance or
21 not? If they did not, they're in violation of Rule 11.

22 Rule 11(b) says, and it's called, importantly,
23 representations to the Court -- this is serious stuff. And it
24 says, by presenting to the Court a pleading -- which is what
25 you have here and I'm skipping ahead -- an attorney certifies

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1 that, to the best of the person's knowledge, information and
2 belief formed after an inquiry reasonable under the
3 circumstances. That's what it says. What Judge Engelmayer
4 says is, an inquiry reasonable and under the circumstances here
5 must mean -- must mean -- that plaintiff's counsel showed a
6 draft of the statements to the witnesses in advance.

7 And I am asking plaintiff's counsel right now, in
8 front of your Honor, they know the answer to this question and
9 they went through a lot of words and never said the answer, did
10 they or didn't they show a draft in advance to these people, or
11 were these people ambushed?

12 When we went to them, they didn't even know there was
13 a complaint. They learned of the complaint for the first time
14 from us. They saw it for the first time when we showed it to
15 them. They were appalled, and you see all that in their sworn
16 statement.

17 So, notwithstanding all the verbiage that we just
18 heard, the whole concept of treating this like it's sort of a
19 game and saying, oh, no, no, no, it's the defendants that are
20 doing the wrong thing, it's exactly what you're not supposed to
21 do. This is a serious matter of integrity. Unless they can
22 testify right now or tell the Court right now, or challenge
23 whether or not they showed a draft of these statements in
24 advance, they are in violation of Rule 11.

25 And to answer your Honor's question very specifically,

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1 under those circumstances, the right thing to do is dismiss the
2 complaint immediately, as a matter of Rule 11, as a matter of
3 fundamental integrity of the Court, and as a matter of
4 plaintiffs having overcome the PSLRA heightened pleading
5 standard by basically making stuff up.

6 Now, whether or not they want to show that they have a
7 text chain from their private investigator, none of that is
8 relevant, unless they can tell your Honor right now that they
9 showed a draft to the CWs, because we should not be in these
10 circumstances.

11 You know, the plaintiff just said, oh, this is
12 something the defense bar does; it's exactly the opposite,
13 that's not true.

14 What happened and what Judge Engelmayer says in
15 Millennial Media, that there is a growing and disturbing trend
16 in the plaintiff's bar of using CW attributions loosely. The
17 reason for that, and the reason this is so, just, important is
18 the PSLRA, the Securities Litigation Reform Act, imposed
19 heightened pleading standards. It made it harder for
20 plaintiffs to bring these cases, and congress did it on
21 purpose. Congress did it because congress acknowledged, the
22 Supreme Court said it and we all sort of know this, that as
23 soon as plaintiff's lawyers get over a motion to dismiss and
24 can get a defendant in their discovery clutches, the case has
25 massive settlement value. The numbers are so high, discovery

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1 is so expensive that they basically extort a settlement, and
2 because of that practical problem, congress imposed heightened
3 requirements on plaintiffs wishing to get through to discovery.

4 In order to satisfy the heightened pleading
5 requirement, the heightened scienter requirement, it has
6 basically created, virtually, a necessity for plaintiffs to
7 include confidential witness testimony. That's the only way
8 they're able to get through to discovery. If plaintiffs are
9 allowed to simply make things up and then get into a spitting
10 match with regards to, well, the CW really was saying it's true
11 before and they were coerced into changing their testimony,
12 then the protections of the PSLRA become meaningless.

13 And in that regard, I want to emphasize two things,
14 your Honor, that we haven't talked about yet today, and that is
15 the overt efforts by plaintiff's counsel to prevent us from
16 finding out what we have shown you now and getting it before
17 the Court. They are transparent and they show that this was
18 part of, I submit, it appears to be, there is a prima facie
19 case that this was all extremely deliberate.

20 Let me start with the first of the two incidents I
21 want to call to your Honor's attention.

22 As soon as the motion to dismiss was granted,
23 virtually, the first thing we did was, we said, tell us who
24 your CWs are. In the Southern District, your Honor, that is
25 about as normal as saying what's the weather. It's the first

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1 thing every defendant does when they've lost the motion to
2 dismiss and it is always routinely provided by plaintiffs. In
3 this case, and we thought it was bizarre, at first they said
4 they would do it with their 26.1 disclosure, but when we got
5 their 26.1 disclosure, we got 17 names and we couldn't tell who
6 the CWs were. So then we said, okay, tell us who they are and
7 they said, no; they did a flip-flop. We said, well, you have
8 to, and they said, we're not going to tell you. This is all in
9 an email, and we included all of this in our motion. And then
10 we said, we're going to go to the Judge. And then they said --
11 and here's the tell -- you can't go to the Judge yet. The only
12 time to go to the Judge is at the end of discovery or with an
13 omnibus motion with regard to issues and all other disputes.
14 In other words, they were suggesting that, first, they had to
15 get all the documents and all the discovery before this issue,
16 which I'm raising now, can even be raised here to your Honor,
17 and we obviously didn't know it yet.

18 The second thing they did is, when we took that to
19 Judge Rakoff, who basically laughed it off -- I mean, he was on
20 the phone, he said, well, of course you have to give them the
21 CWs' names. So, we got them. Then we tried to depose the
22 remaining CWs and the plaintiffs did exactly the same thing,
23 they served the subpoena for December and said there could be
24 no depositions of the remaining three CWs until after all the
25 documents were produced.

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1 So that's twice that they took a position which was
2 deliberately designed to prevent us from finding out what's
3 going on until after they got the benefit of all the discovery,
4 because that is the strategy here. The strategy is, make stuff
5 up, stick it in a complaint, don't diligence the complaint. We
6 get through the discovery stage, we get everything in the door,
7 and then who cares what happened. It's sort of a no harm, no
8 foul, we'll find other stuff in discovery. That is exactly the
9 evil, the evil that the PSLRA and the automatic stay and the
10 heightened pleading standards, exactly what they were supposed
11 to stop.

12 So, yes, this is absolutely the time to be raising
13 these issues, because there has been a fraud on the Court.
14 They can't give -- I don't even understand what they're saying,
15 the CWs didn't say this. They said what they said, your Honor
16 has it under oath, and now they're in this position of trying
17 to impeach their own confidential witnesses. The whole thing
18 stinks. They should not be allowed to get away with it.

19 And it happens, as I said, again, to answer your
20 Honor's question, the Millennial Media case in front of Judge
21 Engelmayer, he cites several other cases in the Southern
22 District and elsewhere, the Boeing case, the Campo case, they
23 all state, which is the Second Circuit, all state that this is
24 the proper procedure when there has apparently been invented CW
25 testimony. You lose to reconsider, immediately. You move to

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1 dismiss for sanctions and you stop the whole thing in its
2 tracks.

3 So, the only question, the only thing -- and I can
4 hear what they're doing, your Honor just heard what they're
5 doing, they're going to raise a stink and say, no, no, no, it's
6 the defendants who violated the law and they've gotten the CWs
7 to change their testimony. The whole thing is -- that's where
8 you should be looking.

9 But, no, there is one question and one question only,
10 and that question is, did they or didn't they show a draft to
11 these three CWs before they went ahead and used their names or
12 used their testimony and filed a complaint? And that is the
13 procedure, if your Honor looks, again, at the Millennial Media
14 case with Judge Engelmayer.

15 What he did is, he asked for a series of inquiries
16 only from the plaintiffs in which he said: I want to know the
17 procedure you used in order to get this information; I want to
18 know whether you diligenced it; I want to know whether you
19 showed the individuals who drafted the complaint; I want to
20 know if you just relied on what the PI said; and I want
21 declarations from each of them. That's what he did.

22 What he found out was that, in that case, ten to the
23 eleven said they had never seen a draft of the complaint,
24 didn't know their names were being used in litigation, exactly
25 what these three said. And as I said, he said that would both

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1 violate Rule 11 and basic human decency.

2 So, yes, this is the time to raise these issues, they
3 cannot be allowed to get away with this, and they cannot be
4 allowed to get away with trying to change the subject and
5 turning this into a normal, sort of, litigation strategy issue.
6 Their conduct is on trial now and these three CWs' testimony
7 alone, coupled with the fact that CW1's testimony is plainly
8 false, all coupled with their incredibly inappropriate behavior
9 in discovery, blocking our ability to get the CWs' names,
10 blocking our ability to get their depositions, all expressly
11 trying to get all the document discovery in before we're able
12 to know what happened, all raises the question as to whether or
13 not this case can proceed at all.

14 THE COURT: This is Judge Cronan.

15 Thank you, Mr. Polkes.

16 Mr. Gilmore, I think that question is a fair one from
17 reading Millennial Media. Judge Engelmayer noted that it's
18 difficult to come up with a good reason why counsel would not
19 attempt to confirm, with a witness, the accuracy of the
20 statements that are going to be attributed to the witness and
21 the complaint.

22 Are you prepared to answer that question, whether or
23 not three confidential witnesses, or really all six of the
24 confidential witnesses, whether all six of them were shown the
25 statements in the complaint that were attributed to them?

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1 MR. GILMORE: Your Honor, Lucas Gilmore.

2 Yes, I am prepared.

3 No, they were not.

4 Number one, that's not the established practice or
5 what sets forth what Rule 11 is.

6 To your second question, we did take efforts to ensure
7 the accuracy. We attempted to contact them multiple times.

8 For one of them, they chose not to participate after
9 they realized that they weren't being compensated and had no
10 upside. One of our attorneys spoke directly to one of them and
11 verified that they did, in fact, speak to the investigator, but
12 stopped participating when he knew he was going to be -- or
13 when we couldn't guarantee he was not going to be subpoenaed.

14 Mr. Polkes is leaving out a great body of law that
15 shows that Millennial Media -- that is not the established
16 practice and not the parameters of Rule 11. In fact, Judge
17 Engelmayer goes out of his way to say that this is not the law.
18 He's setting forth indicta what he believes to be are the
19 absolute best practices in order for attorneys to avoid or take
20 steps to mitigate avoiding the recanting issue.

21 The fact of the matter is, is three of the CWs, the
22 most prominently featured, stand behind each and every one of
23 the allegations.

24 Also, in your question, which was not answered by
25 Mr. Polkes, is why is this an appropriate motion, and it's not.

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1 In each of the cases that they mentioned, Boeing, that had to
2 do with one confidential witness that fully recanted and was
3 done after there was full discovery, which is not the case
4 here.

5 There were also charges about us trying to obstruct
6 defendants, and that's been completely distorted. It is common
7 to include confidential witnesses. We told them that the
8 purpose of our call was to assist in our investigation for
9 litigation against Sasol and senior executives. They knew
10 exactly that this was for purposes of litigation, so they were
11 told that.

12 And the issue of obstructing, it's completely false.
13 In order to facilitate a frank discussion, we say that we will
14 do our best to maintain their confidentiality, particularly
15 when each of the witnesses, whom Mr. Polkes talked about,
16 expressed major concern about being contacted.

17 When the defendants informally asked us to provide,
18 over email, the names of the confidential witnesses, we
19 properly objected. There is a split of authority, including
20 cases authored by Judge Scheindlin and others that say the
21 identity of the witnesses themselves is attorney-work product.
22 We took that issue to the Court.

23 We also raised that there was an issue of privacy. We
24 took that issue, Judge Rakoff disagreed with the attorney-work
25 product, but he agreed on if you do it privately, and we

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1 provided the names, promptly, to the defendants and their
2 contact information for attorneys eyes only.

3 As for our objection for the depositions of the three
4 CWs, those were entirely well founded. The defendants wanted
5 to take the depositions of three individuals on a single day,
6 they represented that they have tens of thousands of documents
7 in their custodial files; haven't produced a single one of
8 them.

9 There is a structure in place that the Court has set
10 where documents will be produced first, followed by Merit's
11 deposition, and these three CWs are Merit's depositions. We
12 should have a full and accurate record, and that's the same
13 opinion that's shared by the CW's attorneys, Mr. Schirripa.

14 MR. POLKES: Your Honor, it's Mr. Polkes.

15 Can I just add one thing? I know we're throwing a lot
16 of stuff at you.

17 THE COURT: You may. Absolutely.

18 MR. POLKES: Thank you, Judge.

19 I think what is really important is, I just heard some
20 confusing additional details about the process engaged in by
21 Hagens Berman.

22 Apparently, now what they're saying is some of the
23 CWs, I can't tell if what Mr. Gilmore is saying are the three
24 that are at issue here that submitted the declarations wanted
25 to be paid, and when they found out they weren't going to be

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1 paid, they refused to cooperate, something like that. And I
2 heard him say, with regard to another one, they said, can you
3 assure that my name won't get out, and then when they said no,
4 he then said he wouldn't cooperate.

5 And if those are our three CWs, what they're now
6 telling your Honor is they have three people who specifically
7 expressed a desire not to be included in this litigation, who
8 they nonetheless included. It is hardly a surprise, under the
9 circumstances, that things are getting messy. And that is
10 exactly the issue that Judge Engelmayer focused on in
11 Millennial Media.

12 And I think what those, sort of, dribbled out
13 additional details suggest, and I very respectfully submit,
14 rather than let plaintiffs turn this next round of briefing
15 into a circus where they raise every issue under the sun and
16 start challenging whether or not their own CWs are lying under
17 oath or changed their testimony from what they told the PI or
18 something else, that your Honor follow exactly the same
19 procedure as Judge Engelmayer, and make Hagens Berman submit
20 detailed declarations, under oath themselves, as to what
21 procedures they followed in connection with at least these
22 three CWs, if not all six, what they learned, what they were
23 told, whether they were instructed to follow through or not,
24 whether they showed them the complaints or not, which we now
25 have heard that they did not.

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1 And, again, it's not hardly a surprise they were
2 specifically told by these people, I refuse to participate in
3 your lawsuit. If that's an explanation as to why they then
4 didn't show them a draft complaint, that makes this even worse.

5 And so, those are the questions that need to be
6 addressed, I respectfully submit, before we can proceed, rather
7 than have Hagens Berman turn this into a circus.

8 I think the same procedure that was followed in
9 Millennial Media is imminently appropriate here, which is,
10 let's find out what Hagens Berman did, what they knew and when
11 they knew it. That's the next step, I respectfully submit.

12 THE COURT: This is Judge Cronan.

13 Mr. Polkes, would there be any benefit to conducting
14 limited discovery simply on this issue with respect to the six
15 confidential witnesses, whether it be narrowly-tailored
16 depositions to clarify any of the --

17 MR. POLKES: Yes. That makes sense to me, too, your
18 Honor, as the next step. I agree with that.

19 I was originally thinking, Judge, let's just do it in
20 open court and your Honor can satisfy himself that these people
21 are telling the truth, but I'm being conscious of their desire
22 to preserve anonymity. That's exactly what isn't supposed to
23 have happened; right? They shouldn't be here. They should
24 have never been named in the complaint. So, I think asking to
25 do this in open court sort of undermines part of the principles

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1 that we're trying to defend here. So, I do agree that we could
2 do them as depositions, if they can be maintained pursuant to
3 the confidentiality order, and that when they're submitted to
4 your Honor, they're done with identifying names redacted.

5 Just on these very narrow provisions, again, my
6 concern here, and I think you've heard it loud and clear, is
7 the plaintiff's firm is treating this as a strategic issue
8 rather than that as an inquiry as to what has gone wrong.
9 Something has gone profoundly wrong. We are not supposed to be
10 in a position like this where three names are being withheld
11 from us, are saying not only that they never said these things
12 to the investigator, but that, in fact, they said the exact
13 opposite.

14 I mean, what CW5 says is that the investigator was
15 pushing the concept of, didn't you know this project was going
16 to cost \$11 billion all along. And CW5 responded, no, that's
17 not true; as far as I was aware, it was \$8.9 billion and that's
18 that.

19 And yet, by the time it ends up in the complaint, what
20 we see is, CW5 said that he always knew the project was going
21 to be \$11 billion. That is a fundamental lie. That is a fraud
22 on the Court. He has now said it under oath.

23 And, again, this whole question of, well, maybe he
24 wasn't telling the truth now, maybe he told our investigator
25 something different; you essentially waive the right to make

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1 that argument if you didn't diligence your complaint with the
2 guy, you know, it's the paragraph you referred to in Millennial
3 Media, it's exactly right. What good reason could you possibly
4 have, other than trying to bury your head in the sand for not
5 going back to CW5 saying, look, here's what we're going to say,
6 are you good with this or not. And if CW5 is one of these
7 people who said, I don't want to cooperate with you, maybe that
8 explains why they didn't go back to him, but that's not good
9 enough. That requires dismissal.

10 This is a serious, serious thing that requires --
11 again, I respectfully -- I never -- it's entirely up to your
12 Honor, obviously. I know I'm sort of getting emotional about
13 this, repeated about this, but, your Honor, the inquiry has to
14 be into Hagens Berman's conduct. How did we get here? We are
15 in a place we should not be. Things went seriously wrong. And
16 Hagens firm should not be treating this just as a strategic,
17 you know, let's come back and attack them now. That's not the
18 issue.

19 MR. GILMORE: Your Honor, if I may be heard? This is
20 Lucas --

21 THE COURT: Go ahead.

22 MR. GILMORE: So, what we've heard is that we're --
23 that our opposition brief and our opposition to this motion is
24 to be expressly limited and that we can't make out our case.

25 Also, this phenomenon is not extraordinary. This

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1 happens quite frequently, including in the Southern District of
2 New York, where witnesses, once the discovery process starts,
3 due to pressure and exertion of the defendants, change their
4 initial testimony, and that's precisely what happened here. We
5 will show a record that it makes absolutely no sense. These
6 witnesses spoke for hours on end with our investigator.

7 Then the issue of diligencing; we did due diligence.
8 It was corroborated by three other confidential witnesses who
9 testified to the same exact issue of cost overruns, it's
10 supported through our copious notes and memorandums of what
11 these individuals said, and it's corroborated by Sasol's own
12 board of directors, who have now -- who admitted that there are
13 errors and omissions in their costs and schedule, that it was
14 due to not inadvertence, but inappropriate conduct done by the
15 LCCP leadership, the same individuals who the three CWs that
16 Sasol now represents, and who we spoke to, identified the same
17 individuals who our other three CWs identified, and the same
18 individuals who Sasol later fired.

19 So, to suggest that this case hinges on now the
20 purported recantation by these individuals is wrong. It's also
21 presumptuous because they haven't produced these individuals'
22 files, which will, in addition, corroborate what their initial
23 account was. And so, that's exactly why we need a full record.

24 MR. POLKES: Your Honor, may I?

25 THE COURT: You may.

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1 MR. POLKES: They lost the right to all of this when
2 they failed to show the CWs a draft of the attributions they
3 intended to make. That's the problem. We just heard a whole
4 word salad about other people and it's corroborated.

5 Let me give you another example, specifically, your
6 Honor, what is off the rails here, if what they're incredibly
7 saying is normal.

8 CW2 is the lynchpin of the allegations for a
9 particular reason. CW2 is a person who ostensibly told the
10 concerns about the project being way over budget to the
11 speakers of the allegedly false statements. Without that nexus
12 of the CWs to the speakers of the false statements, the
13 allegations don't hold together and it gets dismissed, so CW2
14 is critical. And what the complaint says about CW2 is CW2 was
15 in a senior position, knew the project was over budget, late,
16 and in no way was going to come in at \$8.9 billion and told
17 that to senior management. That's what it says.

18 You have CW2's sworn declaration now, your Honor, in
19 which CW2 says that he never said those things and, in fact,
20 that what he said was the exact opposite; the project was on
21 time and on budget. That's what he says he told the
22 investigator and, obviously, therefore, that he never said to
23 senior management anything of the sort that the project was
24 late or over budget.

25 So, something is seriously wrong. To even suggest

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1 that that's a normal thing that could possibly happen is
2 outrageous.

3 The only issue that needs to be -- that can be, again,
4 I respectfully submit, investigated here is: How did this
5 happen; what went wrong; what did they say to CW2; why didn't
6 they show CW2 a draft of the complaint; did they think about
7 it; is it true, as CW2 says, that the first time CW2 found out
8 about this is when we presented CW2 with a copy of the
9 complaint.

10 Those are the facts at issue, that's what Millennial
11 Media is all about, and that is the only way to preserve the
12 integrity of this proceeding, as opposed to turning it into
13 just another, sort of, normal development in a litigation.

14 That's not what this is. This is a matter of
15 plaintiffs who, apparently, there is a prima facie case that
16 they literally made stuff up, stuck it in a complaint solely
17 for purposes of getting over the PSLRA heightened pleading
18 standards, and then tried to keep us from finding out long
19 enough until they could get the benefit of all the discovery,
20 at which point, they were going to try and change the subject.
21 That is exactly what you are not allowed to do. It is a huge
22 problem.

23 The entire process of the PSLRA depends on the
24 integrity of plaintiffs making accurate statements to the Court
25 and conforming to Rule 11, and if they're telling you, which

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1 they did, they never even showed a draft to these witnesses,
2 which, as your Honor already said in that paragraph from Judge
3 Engelmayer, there is literally no good reason not to do that.
4 It is not an accepted practice. That's crazy.

5 And look where we are now. We have witnesses
6 specifically saying that they said the exact opposite. They
7 can't be put on trial. This isn't just like a normal motion
8 you raise at the end of discovery. This is a huge, serious,
9 profound problem because --

10 MR. GILMORE: Your Honor, if I may be heard again on
11 that issue.

12 THE COURT: Yes, just briefly and then we'll --

13 MR. GILMORE: Yes, very briefly.

14 There is no established law that we need to obtain
15 consent from witnesses that they want to be involved in a case.
16 If that were the case, then you would virtually have no
17 confidential witness that would be involved. That is not what
18 the law is. In fact, it's established and accepted practice,
19 and we'll fight to multiple occasions, in which you can rely on
20 the investigator's investigation.

21 With respect to CW2, you will see that there was first
22 a call for 22 minutes, during which the details of the account
23 came out, in which CW2 expressed skittishness about not wanting
24 to go forward, being involved. But then, later, there is a
25 subsequent call for over 40 minutes, which this witness

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1 provided. It's strange credibility that the witness, during
2 that time, would tell the confidential -- would tell the
3 investigator that actually was on budget. It further strains
4 credibility when you have other confidential witnesses, that
5 stand by that says that it wasn't, and they corroborate the
6 initial witness. And then, lastly, it's further strains
7 credibility when you have Sasol's own board confirm what all of
8 these witnesses provided in their accounts.

9 So, that's my point.

10 THE COURT: This is Judge Cronan.

11 All right. Thank you, both. This is certainly a
12 complicated situation. Here is what I think we should do. My
13 feeling is the more information we have regarding the
14 confidential witnesses, the better position I'll will be in
15 figuring out what to do with respect to the defendant's motion.

16 I'm going to stay discovery in this matter and stay
17 other deadlines, including the class certifications motions for
18 the pendency of the motion for reconsideration. I think that's
19 appropriate under the PSLRA, both in terms of the spirit of
20 that statute, including to reduce a nuisance suit through a
21 heightened pleading standard, and also given the statute's
22 automatic stay while motions to dismiss are pending, granted
23 this is a motion for reconsideration of the denial or
24 dismissal, but given the nature of the motion, I think a stay
25 is warranted.

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1 I will allow three weeks of limited discovery with
2 respect to the confidential witnesses, the six confidential
3 witnesses in the event either party wishes to depose those
4 witnesses. I believe Judge Rakoff's order had originally
5 included language essentially showing that an individual, a
6 witness may only be deposed once unless there is a showing of
7 good cause. Here, I find that a limited deposition as to these
8 witnesses, merely on the issues that we've been discussing
9 today, specifically whether or not they made the statements
10 that are attributed to them in the complaint, is good cause for
11 an initial deposition of them and the possibility of more
12 fulsome depositions of the witnesses in the future. As I said,
13 that will be a three-week period during which the parties can
14 conduct those depositions.

15 I will then give the defendants a week after that to
16 submit any additional information they want to submit in
17 support of their motion for reconsideration. Plaintiffs will
18 have three weeks after that to file the opposition to the
19 motion for reconsideration, and defendants will have a
20 reasonable period of time after that for reply.

21 So, three weeks from today will bring us to December
22 1st, that will be the close of limited discovery from the six
23 confidential witnesses. Any supplemental submissions, December
24 8th from the defendants. The plaintiff's opposition for
25 reconsideration, that should be due by December 29th. Any

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1 reply in further support of the reconsideration motion shall be
2 by December 8.

3 I've been referring to the reconsideration motion, but
4 if the defendants choose to persist with the motion for
5 sanctions, both issues should be briefed to be briefed together
6 at the same time.

7 Understanding that the parties may not agree with that
8 schedule, does either side have a reason why this schedule
9 cannot be one that we can enter in this case?

10 I'll start with you, Mr. Gilmore.

11 MR. GILMORE: Yes, your Honor. In principle, we would
12 agree with that schedule, but I would like to just get some
13 clarity.

14 THE COURT: Sure.

15 MR. GILMORE: One thing that the defendants had
16 previously offered, certified that they would do, is that they
17 would produce, a week in advance of the depositions, the
18 custodial files of these individuals. We think that we should
19 certainly have those and would like -- and that should be a
20 part.

21 We've also asked for the defendants to produce the
22 communications that they had with the three CWs, including the
23 draft affidavits, and we think that should be a part of the
24 record so that the Court gets the fullest record.

25 THE COURT: Mr. Polkes.

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1 MR. POLKES: We're fine with the schedule, your Honor.

2 I would like to address the document issues that were
3 just raised by Mr. Gilmore and modify them slightly.

4 We absolutely should not be producing the entire case
5 file with regard to the CWs to them, because that would be for
6 purposes of a whole deposition for all purposes. See, they're
7 at it again. So, that has nothing to do with the specific
8 issue, the limited purpose as to which these depositions are
9 being ordered.

10 What we do think we should be exchanging, however, is
11 we're fine giving them our communications with the three CWs we
12 represent, up until the point where they became privileged
13 prior to their retaining us; however, they have the same thing,
14 and I think we should be entitled to see all their files, all
15 their communications with all of the CWs, including the
16 supposed record of people saying that they want to get paid or
17 they wanted assurance that their identities are going to remain
18 anonymous, we should be getting the same exact thing.

19 So, we're all for exchanging those files, those
20 limited files with regard to the limited issue your Honor is
21 ordering the deposition for in, say, seven days.

22 THE COURT: Mr. Gilmore.

23 MR. GILMORE: Your Honor, this is Mr. Gilmore.

24 Your Honor, the production of the files is something
25 that the defendants had previously agreed to, it's directly

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1 relevant, there is a disputed fact here. We say that the
2 witnesses had an initial account, the three initial had
3 account. The defendants have submitted an affidavit that's
4 changed it. We are entitled to show our -- make an evidentiary
5 showing that the initial account, which has been corroborated
6 from other witnesses, was the one that was accurate, and that
7 we'll show this through documents and their files. And this is
8 something they previously agreed to, they didn't comply with
9 it, but there should be no reason why it can't be done.

10 MR. POLKES: Your Honor, if I may.

11 THE COURT: You may.

12 MR. POLKES: No, this is not -- this is not supposed
13 to be -- I believe, your Honor, that your Honor did not just
14 order -- your Honor, very specifically, said this is a
15 preliminary deposition for the limited questions that are the
16 subject of the motion, in particular, what did these CWs say to
17 the plaintiff's investigator and what did they say to us; and
18 did they, in fact, say different things at different points in
19 time; were they, in fact, shown or not shown a draft of the
20 complaint, and so on; was there some story about them saying
21 that they wanted to get paid, and so on.

22 This is not an opportunity for the plaintiffs to
23 basically do a full-blown deposition on a full documentary
24 record, which is what it was before, and we will be objecting
25 seriously and instructing the witness not to answer for reasons

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1 of this deposition going beyond the limited purpose your Honor
2 ordered it for if they try to turn this into a circus in a
3 full-blown deposition of the witness.

4 THE COURT: This is Judge Cronan.

5 I certainly agree as to the scope. The depositions
6 should not go beyond the subject areas, Mr. Polkes, that you
7 just mentioned.

8 I guess what I'm struggling with, not having
9 familiarity with the file, is how much of that file would
10 relate to the appropriate subject matter of these limited
11 depositions? What in the file would you be producing to --

12 MR. POLKES: If I understand, the category that I'm at
13 least suggesting, your Honor, subject, you know, hopefully your
14 Honor will agree is fair play for this purpose, is our
15 communications with the witness up until the point the witness
16 retained us and it became privileged. We think we should be
17 getting the same thing from the other side, which is to say,
18 all their communications with all the CWs, and there are no
19 privileged ones because they never were retained as counsel.
20 But all those, the issues that your Honor -- that they just
21 said to your Honor, oh, no, they spoke to us before each of the
22 minutes, and we have PI notes and so forth and so on, that
23 needs to be produced, that's what this inquiry is about.

24 There are emails, during the course of the class
25 period, to friends and other things are not what is at issue

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1 right now. They're not cited or referenced in the complaint,
2 none of them are material to the complaint. The only question
3 is the integrity and truthfulness of the attributions made to
4 the CWs in the complaint, that is the only issue here. And,
5 presumably, if there was to be a second deposition on for all
6 purposes, they would get the whole file at that point.

7 THE COURT: I agree. Mr. Gilmore, you're planning to
8 provide to Mr. Polkes the same materials in terms of
9 communication with the confidential witnesses in preparation of
10 the complaint; right?

11 MR. GILMORE: Your Honor, yes. To be clear,
12 communications, we are not -- now, our work product that
13 reflects our mental impressions, no, but we have nothing to
14 hide here and our intention is to submit that to the Court for
15 in-camera review so that we're not waiving any kind of work
16 product, we'll certainly do that.

17 What Mr. Polkes is breezing over is each of these CWs,
18 in their initial accounts, testified to generating or receiving
19 or sending specific documents to the senior executives, and if
20 we have -- we need that in order to show the accuracy of their
21 initial account. It's not full-blown discovery. It's limited
22 to these initial witnesses, because what's going to happen is,
23 with the other three CWs who stand by their allegations, the
24 defendants are going to ask substantive questions on those.
25 It's not providing us with a full and fair record.

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1 MR. POLKES: Your Honor, I think Mr. Gilmore -- I
2 think he just got carried away.

3 The complaint refers to no document sent, drafted, or
4 reviewed by any of the CWs. The only exception, possibly, is
5 that CW1 is claiming to have seen a change order, which you now
6 know, by virtue of essentially the 30(b)(6) testimony, doesn't
7 exist. But, setting that aside, and I'm happy to make that the
8 standard, there is no document referred to in any of the CW
9 attributions in this complaint, period, full stop.

10 THE COURT: This is Judge Cronan.

11 Mr. Gilmore, after you said that, I was just pulling
12 up the complaint to look myself. Are there particular
13 documents that you're referring to that were mentioned in the
14 complaint attributed to the CW?

15 MR. GILMORE: Yes. CW4 references signing off on
16 projects on his work and in terms of the LCC project being
17 stipulated for \$36 million in negative value and
18 self-construction product -- construction. He also talked
19 about signing off on their cost estimates. This is all in
20 paragraph 83 through 90. That's CW4.

21 CW6 says, as you mentioned -- excuse me, CW1, as you
22 mentioned, expressly talked about the floor change order, as
23 well as monthly reports received by him, as well as other
24 senior executives.

25 CW6 talked about, in paragraph 97, about completion

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1 dates that were made to appear on paper that were not completed
2 in time and expressly references those. We need these types of
3 documents, the documents that they're generating to show that
4 their accounts are completely accurate.

5 MR. POLKES: Your Honor, it's tens of thousands of
6 documents. Again, they're basically just trying to turn this
7 into full-blown discovery so that they can impeach their own
8 CWs and get them to say that now they're lying. It's just
9 totally -- we've turned this into a circus. And none of those,
10 that I will add that you just heard about, are particular
11 documents that were relied upon in connection with the CWs'
12 attributions. They're just categories of things like change
13 orders and so forth. And you even just heard reference to one
14 of their own CWs, which isn't even relevant. So, again, we
15 can't and shouldn't have to turn over tens of thousands of
16 documents that basically go to the guts of the whole case so
17 they can turn this into an opportunity to impeach their own CWs
18 and turn this whole thing inside out.

19 Again, the question is, did they show a draft to these
20 people, how did these -- did these people, in fact, tell them
21 something different the first time. That is a limited issue.
22 That doesn't give them the ability to turn this whole thing
23 into a, sort of, crazy impeachment festival where they try and
24 say the whole thing is a lie and essentially trying to prove
25 their case in these limited-purpose depositions.

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1 THE COURT: If this case provides the defendant's
2 motion, there will be ample time for fuller depositions of the
3 CWs and with fuller record.

4 For now, I agree with Mr. Polkes, that the issue is a
5 pretty straightforward one, what did the CWs tell the
6 plaintiffs regarding -- that was later represented in the
7 complaint. How did those communications occur; how were they
8 memorialized; how were they represented in the complaint; were
9 the CWs shown a copy of the complaint and what they would be --
10 how their statements would be characterized, regardless of
11 whether that's required or not. I think that's relevant to
12 know.

13 For now, I think if we go down the road of
14 scrutinizing all the documents that could be potentially
15 relevant to the CWs' statements in the complaint, we're going
16 to be going far field from the limited focus of these
17 depositions. So, for purposes of documents being stayed in
18 advance of depositions, I think we need to keep it to the
19 narrow scope that I just discussed.

20 MR. POLKES: Judge, if I could make one request, Judge
21 Cronan, which is that prior to the depositions, Hagens Berman
22 be required to submit, give us and the Court, a declaration in
23 which they set forth the processes, procedures that they
24 followed in connection with putting the attributions of the CWs
25 in the complaint. That's the same thing that was required by

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1 Judge Engelmayer, and I think we need that before they go in
2 and start trying to cross examine people who didn't want to be
3 in this case in the first place. We should be able to see what
4 it is that they're going to claim about them so that they have
5 the opportunity, so the CWs, in fairness, have the opportunity
6 to see what Hagens Berman is going to accuse them of before
7 they go ahead and do it in a deposition.

8 MR. GILMORE: Your Honor, that's completely
9 inappropriate. That's not the process. We will submit
10 information showing, in our opposition to this motion, exactly
11 what we did, but we should have the opportunity to
12 appropriately cross examine, and we don't need to show an
13 outline or a preview of what our questions are going to be,
14 that's improper.

15 THE COURT: I would agree with Mr. Gilmore on that.
16 I'm not going to order that declaration in advance of the
17 depositions. I think --

18 MR. POLKES: Your Honor -- but could your Honor order
19 them to do it in connection with their opposition so at least
20 it's part of the record?

21 THE COURT: I think that's what Mr. Gilmore just said,
22 but I would agree that that would be appropriate to include as
23 part of their opposition.

24 Is that your intention, Mr. Gilmore?

25 MR. GILMORE: This is Lucas Gilmore.

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1 Yes, our intention is to show the full scale of our
2 robust in good faith and investigation that would include from
3 our investigator, and if you want it from counsel, we're happy
4 to provide that.

5 THE COURT: I think we covered what we needed to and
6 have a way forward. We'll have a docket entry.

7 MR. SCHIRRIPA: Your Honor, this is Frank Schirripa.
8 I represent three of the CWs. I haven't had an opportunity to
9 speak. My limited involvement in the case is just limited to
10 the representation of three CWs, separate and apart from the
11 CWs that are now being represented by defense counsel.

12 I would just, by concern, if the parties -- the
13 plaintiffs and defendants here are going to be engaged in some
14 sort of preliminary review and production of documents perhaps
15 over the next week and a half leaving, really, Thanksgiving
16 week and a few other dates for depositions. I am concerned
17 with receiving those documents late in the game and then having
18 to get my three clients available for depositions, which, by,
19 you know, way of today's hearing and certainly a copy of the
20 transcript, I think would be limited. Can we establish any
21 sort of time limit on those depositions? I'm just mindful of
22 Judge Rakoff's prior order and limitations on Merit's related
23 issues. I think your order today and, really, the hearing
24 today is perhaps focused on three to four questions, which I
25 don't think would take more than an hour of deposition time.

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1 THE COURT: Thank you. I did not realize you were on
2 the line. Thank you for speaking up. I think that's
3 completely reasonable.

4 I guess there are two questions. One is whether or
5 not my timeline of three weeks was too ambitious, given the
6 Thanksgiving holiday the week after next, and two, what time
7 limits to put on the depositions.

8 Let me hear from Mr. Gilmore and Mr. Polkes, as well,
9 as to what you think a reasonable time limit on the deposition
10 would be. I think Mr. Schirripa makes a good point that these
11 are pretty narrow questions. You may need longer than an hour,
12 but I'm not sure we need that much longer than an hour.

13 Mr. Gilmore.

14 MR. GILMORE: Yes, your Honor. Just a quick question,
15 and just in seeking further clarity; I'm unclear as to why
16 Mr. Schirripa's clients would need to go forward with the
17 deposition. That's their -- they're not at issue. There is no
18 question -- and Mr. Schirripa will represent that, and we have
19 affidavits from them in our possession, that their allegations
20 are 100 percent accurate. So, we're unclear why, if at all,
21 that deposition needs to go forward.

22 The only question are for the three CWs that are now
23 represented by defense counsel, who have recanted, and that's
24 the only type of question as to whether or not we accurately
25 reflected their accounts. So, it's my understanding what the

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1 Court was saying, was that it was limited to those witnesses.

2 THE COURT: This is Judge Cronan.

3 I had not intended to limit it just to the other three
4 confidential witnesses, but also, I have not seen those
5 declarations from the three witnesses that Mr. Schirripa
6 represents. I'm not sure if Mr. Polkes has.

7 Mr. Polkes, have you seen the declaration as of yet?

8 MR. POLKES: No, your Honor, they haven't shown them
9 to us at all.

10 Let me say, I also assumed your Honor was ordering all
11 six, and it's only fair. We produced declarations and they
12 want our depositions, they haven't produced declarations and we
13 want to see their people, too. Remember, we tried to get them
14 in advance into a block. We would like to know what it is that
15 they have to say.

16 THE COURT: This is Judge Cronan.

17 I think that the declarations that have been submitted
18 create enough of a question that I think it would be
19 appropriate to have, if Mr. Polkes chooses to, depositions of
20 the witnesses represented by Mr. Schirripa, as well. So, I do
21 think we're including -- I do intend to include all six within
22 this limited discovery over the next few weeks, but again,
23 these should be pretty short depositions. I don't think there
24 is a need for them to be more than an hour or two hours.

25 MR. POLKES: Your Honor, Mr. Polkes here.

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1 I was going to say an hour is fine with us if that's
2 what Mr. Schirripa wants, as long as it's across the board for
3 everybody, we'll limit it to an hour.

4 THE COURT: Mr. Gilmore.

5 MR. GILMORE: Yes, your Honor, that's fine, as long as
6 the three CWs, the one hour is limited to the limited focus of
7 what the Court set out about their initial account and the
8 accuracy as put forward in the complaint.

9 THE COURT: I would hope, at this point, we have
10 clarity on that, that that would be the limited scope of the
11 deposition and of the potentially six depositions. And given
12 that scope, it should be within -- we should be able to handle
13 them within an hour.

14 The three attorneys who are speaking, Mr. Gilmore,
15 Mr. Polkes, and Mr. Schirripa, do you think that can be
16 accomplished within the next three weeks? Should we push it
17 four weeks to December 8th?

18 MR. POLKES: Your Honor, it's Mr. Polkes.

19 I'm just being mindful of the CWs who are civilians.
20 If we make it four weeks, that probably would help accommodate
21 people's Thanksgiving plans.

22 THE COURT: Why don't we do that. So, the schedule
23 will then be until December 8th to conduct any depositions of
24 those confidential witnesses, Mr. Polkes will have a week to
25 submit anything further he wishes to submit in support of his

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1 motion, that will be December 15th, December 15th is a Tuesday,
2 two weeks from that is December 29th. So, why don't we go to
3 January 5th for any opposition to do that motion for
4 reconsideration. And then the week after that is the 12th for
5 any reply, January 12th.

6 Does that schedule work for the parties?

7 MR. POLKES: Works for the defendants, your Honor.

8 MR. GILMORE: Your Honor, it works for the plaintiffs.
9 Just a couple of points of clarification.

10 One is, we had entered into a deposition protocol
11 that, in light of the pandemic, these depositions would be
12 remote. I wanted to confirm that these would be in accordance
13 with the deposition protocol.

14 THE COURT: This is Judge Cronan.

15 That would seem appropriate, certainly to me, given
16 the current situation.

17 Mr. Polkes, do you have any objection to continuing
18 the prior protocol?

19 MR. POLKES: No, no objections at all, your Honor.

20 MR. GILMORE: The only other point of clarification
21 is, in terms of ground rules to the extent the witnesses are
22 going to be sent or shown any type of documents that haven't
23 already been produced, we would ask that those documents be
24 produced a week in advance.

25 THE COURT: That seems appropriate to me.

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1 Mr. Polkes, do you agree to that?

2 MR. POLKES: Yes, of course, your Honor.

3 THE COURT: I think we covered a lot. Like I said, we
4 will issue a docket entry, a minute entry with the dates that
5 we discussed.

6 Otherwise, is there anything else, Mr. Gilmore,
7 Mr. Polkes, that you wish to raise while we're on the line?

8 MR. POLKES: Yes. One more date that would help, your
9 Honor, I think it would help us avoid a fight. If we can agree
10 to exchange the documents that we had previously talked about,
11 which is to say that communications with the CWs and the record
12 back-and-forth and so on, say, in five days?

13 THE COURT: Mr. Gilmore, does that work for you?

14 MR. GILMORE: Your Honor, I don't believe that's a
15 problem. If there is an issue in terms of producing any
16 documents we haven't harvested, we can work it out with
17 defendants, but we do intend to promptly produce it.

18 THE COURT: Okay. Well, I think that wraps it up.
19 Thank you, all, for your time today. Thank you to the court
20 reporter for transcribing the proceedings. It's certainly not
21 the easiest format for us to be conducting these proceedings,
22 so we appreciate the assistance.

23 I look forward to receiving the briefings from the
24 parties in a few weeks. Have a good day, everyone.

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